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KPG POH PLANTATIONS SDN BHD v. PERBADANAN PEMBANGUNAN PERTANIAN NEGERI PERAK

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
KAMALUDIN MD SAID JCA
B LAU BEE LAN JCA
[CIVIL APPEAL NO: A-02(NCvC)(W)-1723-08-2018]
11 SEPTEMBER 2020

C ***LAND LAW:*** *Lease – Termination – Validity of notice termination – Grounds for termination – Allegation of breach of covenants in agreement – Usage of land against prohibition in agreement – Whether lessor aware of usage – Whether lessor raised objection – Whether breach condoned and approved – Failure to issue notice of demand – Whether notice of termination bad in law*

D ***CONTRACT:*** *Agreement – Termination – Specific performance – Termination of lease – Expiration of first three years period provided in earlier agreement – Absence of supplementary agreement – Whether subsequent agreement continued on same terms after expiration of earlier agreement – Whether treated as equitable lease – Whether lessee entitled to specific performance*

E On 30 August 2003, the respondent ('plaintiff') a statutory corporation, entered into a 'perjanjian sewaan/pajakan' ('agreement') with the appellant ('defendant') to cultivate 350 acres of land in Kampong Poh, Mukim of Bidor, Perak ('Bidor land'). For the first three years, the defendant was to occupy the Bidor land as a tenant and, after three years and subject to the satisfaction of the plaintiff on the progress of the defendant's project and F subject to the approval of the plaintiff's Board of Directors, the plaintiff was to grant a lease for 60 years. However, the defendant could not carry out any activity on the Bidor land due to objection by the Orang Asli community and protest by the NGO. Therefore, on 15 December 2003, defendant applied to the Menteri Besar, the Chairman of the corporation and its Board of G Directors, and obtained a replacement of a similar piece of land in Hulu Bernam in Batang Padang ('Hulu Bernam land'). The parties agreed that the terms and conditions of the agreement should continue to apply until the parties sign the supplementary agreement. In 2007, the defendant appealed to the Menteri Besar for cultivating oil palm and continued to cultivate and H use the Hulu Bernam land as an oil palm plantation. In the meantime, the plaintiff applied for and obtained an individual title in respect of the Hulu Bernam land and, on 23 March 2016, issued a notice terminating the agreement with immediate effect alleging breaches of the covenants of the agreement which included: (i) default in the payment of rental from 2006 to I 2015; (ii) cultivating palm oil on the land; and (iii) erecting buildings. The plaintiff subsequently filed the civil suit for arrears of rental until 2015,

vacant possession, damages and other reliefs. The defendant denied the alleged breaches of the covenants of the agreement and counterclaimed for specific performance and other equitable reliefs. The High Court Judge ('HCJ') held that the defendant was a tenant at will and found the notice of termination was valid and upheld it on the ground of non-payment of rent. The defendant was ordered to deliver vacant possession of the Hulu Bernam land and make payments of arrears of rental to the plaintiff. The HCJ also dismissed the defendant's claim for specific performance but ordered that the defendant was entitled to damages *in lieu* thereof. Hence, this appeal by the defendant. The plaintiff cross-appealed against the order of payment of compensation by the plaintiff to the defendant. The issues for the court's consideration in this appeal were: (i) whether it was wrong of the HCJ to uphold the notice of termination; and (ii) whether the order for vacant possession made by the HCJ was wrong.

Held (allowing appeal; dismissing cross-appeal)
Per Lau Bee Lan JCA delivering the judgment of the court:

(1) Despite the plaintiff's site report in 2014 that the Hulu Bernam land was used for oil palm cultivation, there was no letter from the plaintiff to the defendant that they were not satisfied with the performance of the defendant as to the usage of the land. The plaintiff's allegation that the defendant had breached the agreement, by cultivating oil palm which was prohibited, was a non-starter and flew in the face of their own conduct that it had obtained title to the Hulu Bernam land in 2013 bearing the express condition 'Tanaman Komersial – Kelapa Sawit'. Hence the issue of the defendant's cultivation of the oil palm no longer holds water given that the plaintiff had condoned and impliedly approved the same by not raising its objection at the earliest opportunity available. (para 23)

(2) The occupation of the Hulu Bernam land was on the same terms as the agreement entered into for the Bidor land and the agreement was to continue even after the expiry of the first three-year period. Till the date of the trial, there was no supplementary agreement signed. The HCJ erred in refusing specific performance on the ground that there was no subsisting agreement between the parties which should form the basis of any decree of specific performance. Although the agreement could not be registered under the National Land Code, the court of equity treats the agreement as an equitable lease and may grant specific performance. Further, the plaintiff did not adduce any evidence as to whether there would be hardship or unusual difficulty in performing the bargain and the contrary was found as against the defendant. There was also evidence that the plaintiff did not act fairly to the defendant. (paras 14, 24, 25, 29 & 30)

(3) The HCJ's ruling that the defendant had breached the agreement for non-payment of rental was faulty. There ought to be a prior demand made before the plaintiff could terminate the agreement. The plaintiff's witness admitted that the rental for the three years had been fully settled and conceded that there was no prior demand for the rental after the three-year period until the notice of termination was issued in 2016. Therefore, the notice of termination was bad in law because: (i) there was no demand notice issued to the defendant giving them two weeks' notice prior to the termination as required in cl. 7.01 of the agreement; and (ii) there was no rental due and owing to the plaintiff as the time for the payment of the premium had not been triggered as the plaintiff did not serve the notices required under s. 5 of Schedule 1 of the agreement. (paras 34, 37 & 38)

(4) The HCJ erred in failing to consider the structure of the payment provided in the agreement. The lease had kicked in but the plaintiff had defaulted, in that, having obtained the title, they failed to inform the defendant. Had the plaintiff informed the defendant, the plaintiff would have been entitled to the first tranche of the balance of payment for premium of the lease, *ie*, 20%, from the defendant. Equity had set in and the defendant was an equitable lessee and not a tenant at will. The defendant's appeal was thus allowed. The defendant's counterclaim for a declaration that the defendant was entitled to a lease for a period of 60 years was also allowed, subject to the terms of the agreement. (paras 39, 40 & 42)

Case(s) referred to:

Loh Koon Moy & Anor v. Zaibun Sa Syed Ahmad [1977] 1 LNS 65 FC ***(refd)***
Nadchatiram Realties (1960) Ltd v. Raman & Ors [1965] 1 LNS 122 HC ***(refd)***
Yong Tong Hong v. Siew Soon Wah & Ors [1971] 1 LNS 161 FC ***(foll)***

Legislation referred to:

Contracts (Malay States) Ordinance 1950, s. 30
Perak Agricultural Development Corporation Enactment, 1973, ss. 3, 4
Specific Relief Act 1950, s. 11(2)

For the appellant - Cyrus Das & A Iruthaya Raj; M/s Raj Selva & Co
For the respondent - Zaizuraimy Abd Rahim, Fey Aqis Mohd Khairuddin & Norazali Nordin; M/s Raimy Fuaad Aqis

[Editor's note: Appeal from High Court, Ipoh; Civil Suit No: AA022NCVC-97-06-2016 (overruled).]

Reported by S Barathi

JUDGMENT

Lau Bee Lan JCA:

[1] This is an appeal by the appellant/defendant against the decision of the learned High Court Judge delivered on 8 August 2018 allowing the respondent/plaintiff's claim and dismissing the appellant/defendant's counterclaim. The respondent/plaintiff has filed a cross-appeal against part of the High Court's decision regarding the issue of relief on the claim against the appellant/defendant and damages of the respondent/plaintiff and payment of compensation by the respondent/plaintiff to the appellant/defendant.

[2] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[3] Having considered the written and oral submissions of the respective counsels and the records of appeal before us, we unanimously allowed the appeal and dismissed the cross-appeal. We now set out the reasons for our decision.

Background Facts

[4] The plaintiff is a statutory corporation established under s. 3 of the Perak Agricultural Development Corporation Enactment, 1973 with the power to enter into contract and to sue and be sued. Under s. 4 of the said Enactment, the Menteri Besar Perak is the Chairman of the corporation and its Board of Directors.

[5] Based on the "chronology of common facts", the undisputed facts are as follows:

(i) On 30 August 2003, the plaintiff entered into a "perjanjian sewaan/pajakan" ("the agreement") with the defendant on the terms and conditions stated therein to cultivate 350 acres of land (141.64 hectares) in Kampong Poh, Mukim of Bidor, Perak ("Bidor land"). The nature of the agreement is that for the first three years, the defendant was to occupy the Bidor land as a tenant and after three years and subject to the satisfaction of the plaintiff on the progress of the defendant's project and subject to the approval of the plaintiff's Board of Directors, the plaintiff was to grant a lease for 60 years.

(ii) The manner of payments of rental and the premium ("bayaran pajakan") is governed by s. 5 of the First Schedule to the agreement. The defendant has thus far paid rental of RM171,180 as provided under the First Schedule. This was for the first three years.

(iii) The defendant could not carry out any activity on the Bidor land due to objection by the Orang Asli community and protest by the NGO on its behalf. On 15 December 2003, the defendant applied to the Menteri Besar, who was the Chairman of the plaintiff's Board of Directors at the material time, for replacement of a similar piece of land.

(iv) The defendant's application was allowed and the plaintiff replaced another land in·Hulu Bernam in Batang Padang district ("Hulu Bernam land") consisting of 282 acres (114.12 hectares) and promised to obtain additional land to make up the total of 350 acres originally given in respect of the Bidor land.

(v) Parties have agreed that the terms and conditions of the agreement should continue to apply until parties have signed the supplementary agreement.

(vi) The defendant on 5 February 2007 appealed again to Menteri Besar for cultivating oil palm which is more suitable and commercially viable.

(vii) The defendant planted oil palm sometime in 2007 or thereabouts and continues to cultivate and use the Hulu Bernam land as an oil palm plantation.

(viii) In the meantime, the plaintiff applied for and obtained an individual title in respect of the Hulu Bernam land on or about 4 February 2013. The express condition stated in the title is "Tanaman Komersial – Kelapa Sawit".

(ix) On 23 March 2016, plaintiff's solicitors issued a notice terminating the agreement with immediate effect. In that notice, the plaintiff's solicitors have alleged breaches of the covenants of the agreement which include:

(a) default in payment of the rental from 2006 to 2015;

(b) cultivating oil palm on the land; and

(c) erecting buildings.

(x) On 27 June 2016, the plaintiff filed the civil suit for arrears of rental until 2015, vacant possession, damages and other reliefs.

(xi) On 21 December 2017, the defendant filed its defence denying the alleged breaches of the covenants of the agreement and made a counterclaim praying for specific performance and other equitable reliefs.

Issues On Appeal/High Court Decision

[6] In a nutshell, the crux of the appeal of the defendant turned on the following two issues:

(i) it was wrong of the learned High Court Judge to have upheld the notice of termination; and

(ii) the order for vacant possession made by the learned High Court Judge was wrong.

[7] The aforesaid two issues turned on two substantial points. On the first issue it was concerned with the status of the occupancy of the oil palm plantation by the defendant, was it as sub-lessee or was it as a tenant at will. The learned High Court Judge held that the defendant was a tenant at will and found the notice of termination was valid and upheld it not on the ground of unauthorised use of the land but on the ground of non-payment of rental.

[8] The second issue was concerned with the question of whether the cultivation of the Hulu Bernam land as an oil palm plantation, authorised or unauthorised. The learned High Court Judge found in favour of the defendant. He held that the plaintiff was aware that the land was being cultivated as an oil palm plantation and not for fruit tree cultivation and the plaintiff was not entitled to proceed to recover vacant possession on the ground of usage of land. The plaintiff succeeded on the ground of non-payment of rental and that the defendant was a tenant at will.

[9] There was no cross-appeal by the plaintiff on the ground of the learned High Court Judge's finding that the oil palm cultivation was undertaken with the knowledge of the plaintiff. The cross-appeal of the plaintiff was on the ground of whether or not the learned High Court Judge should have ordered that compensation be paid by the plaintiff to the defendant for cultivation of the oil palm and that it was to be assessed and paid before vacant possession was ordered.

[10] Pursuant to his findings, the learned High Court Judge basically made the following order:

(i) defendant to deliver of vacant possession of the Hulu Bernam land and make payments of arrears of rental to the plaintiff:

(a) "bermula daripada tahun ke empat (2006) sehingga tahun kelima belas (2015) pada kadar RM57,050 setahun berjumlah RM513,540";

(b) "bermula daripada 1 Januari 2016 sehingga 23 Mac 2016 (bersamaan dengan 83 hari) pada kadar RM155.90 harian berjumlah RM12,939.70 yang merupakan jumlah sewa bagi tempoh tersebut"; and

A (ii) dismissed the defendant's claim for specific performance but ordered that the defendant was entitled to damages *in lieu* thereof on a date to be assessed for the cultivation of the oil palm on the said land based on equitable principles.

Our Decision

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[11] The agreement between the plaintiff and the defendant is titled "perjanjian sewaan/pajakan" (rental/lease agreement). It is pertinent to refer to the following clauses in the agreement:

(i) Clause 1.02:

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1.02 The First Party has agreed to rent and lease and the Second Party after checking the land has agreed to accept the rent and lease from the First party upon the consideration and conditions that have been set forth in this agreement to carry out agricultural projects except oil palm (hereinafter referred to as "the project").

D (ii) Clause 3.01:

3.01 The land will be let out for a period of three (3) years at a rate of Ringgit Malaysia Five Hundred (RM500-00) per hectare per annum to evaluate the performance of the project before deciding granting of lease. The decision shall be at the absolute discretion of the First Party only.

E (iii) Clause 3.02:

3.02 After three (3) years, the Second party's request, and if the First Party is satisfied with the progress of the project and if agreed by the Board of Directors:

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(a) Then the said land shall be leased at a rate of Ringgit Malaysia Five Thousand (RM5,000.00) only per hectare for a period of sixty (60) years where the earlier rental paid shall be taken into account as part payment of the premium for the lease.

(iv) Clause 6.01:

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6.01 If the First Party is satisfied with the progress of the project, before or after three (3) years, the First Party shall apply for the issue document of title in respect of the land at its own expense so that the lease on behalf of the Second Party may be registered.

(v) Clause 8.01:

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8.01 If the First Party defaults on any provision under this Agreement or /and fails to complete the transaction due to any circumstances which is supposed to be under the control, the Second Party reserves the right to obtain specific relief against the First Party.

[12] In the agreement, the "first party" and the "second party" referred to I the plaintiff and the defendant respectively whilst "the project" referred to the act of "carry out agricultural projects except oil palm".

[13] Learned counsel for the defendant submitted that initially the Hulu Bernam land was to be let out for three years at RM500 per hectare but later to be converted into a lease which is to run for 60 years. The payment structure of the three-year period followed by the 60-year lease period is such that the initial rental payment is to be taken as part payment of the lease ie, the lease is for the value of RM708,200 and the rental payment for three years under the tenancy is part payment of the premium for the lease leaving a balance of payment for premium amounting to RM495,740 (s. 5, First Schedule). The obligation of obtaining the title for the creation of the lease is with the plaintiff (cl. 6.01). Clause 6.01 when read together with cl. 8.01 meant that if there is a breach under cl. 6.01, the default clause under cl. 8.01 is triggered and we would have to examine to see if the failure on the part of the plaintiff is a matter which falls within their control. Premised on the aforementioned clauses of the agreement (paras. 11 and 12 above) and s. 5, First Schedule (para. 38 below), we had no reason to disagree with the submission of the defendant.

[14] It is not disputed that the occupation of the Hulu Bernam land was on the same terms as the agreement entered into for the Bidor land as per para. 2 of a specific letter dated 20 July 2005 (p. 30, CCB, vol. 2, para 2). This is confirmed by the agreed facts between the parties at p. 81, CCB, vol. 2, para. 5 which reads:

> The terms of the Tenancy/Lease Agreement dated 30/08/2003 shall bind the parties either until the Supplementary Agreement is signed or in the absence of the Supplementary Agreement.

This means that the said agreement was to continue even after the expiry of the first three-year period. It is not disputed that till the date of the trial no supplementary agreement was ever signed.

[15] In 2013 the plaintiff applied for a title of the Hulu Bernam land which the defendant did not know about until at the trial (during the cross-examination of SP1) and the title (p. 91, CCB, vol. 2) was issued on 7 February 2013 with the express condition that it should only be cultivated with "Tanaman Komersial – Kelapa Sawit".

[16] In our view, there could not be any doubt at all as to whether the plaintiff was aware that the Hulu Bernam land was used for oil palm cultivation. This is because the plaintiff carried out an inspection themselves in 2014 as can be seen from their site report of 14 May 2014 prepared by one Azman bin Haji Mathy (at p. 94, CCB, vol. 2). Of relevance is para. 3 which reads: "Dari siasatan yang dilakukan, mendapati Syarikat Kg Poh Plantation Sdn Bhd **masih aktif** menjalankan kerja-kerja perladangan berkaitan pengeluaran buah kelapa sawit". (emphasis added)

[17] Learned counsel for the plaintiff submitted although the title was issued in 2013, the inspection was carried out in 2014, and it was only in 2016, two years later that the plaintiff issued the notice of termination (at p. 62A, CCB, vol. 2) (English translation) basically on two grounds:

(i) unauthorised use of the Hulu Bernam land for oil palm cultivation; and

(ii) non-payment of rental.

[18] The first ground is found in para. 5 of the notice of termination where the plaintiff's objection is that the defendant was not supposed to plant oil palm. It is the defendant's contention that the issuance of notice of termination on this ground that the land use cannot be for kelapa sawit is in contradiction of the title, *mala fide* and is untenable.

[19] In response, the plaintiff submitted that it did not act unfairly and with *mala fide* because although the title was issued in 2013, the agreement was dated 2003, and in between these two periods, the defendant was fully aware that it was doing something expressly prohibited by letters and the agreement ie, cultivating oil palm on the Hulu Bernam land. The correspondences highlighted were:

(i) defendant's letter dated 10 July 2002 to the plaintiff at para. 3 where the defendant was applying to plant palm oil and seeking a leasehold of 60 years (CCB 2, p. 3);

(ii) reply from plaintiff dated 12 December 2002 stating that the defendant's application could not be considered to be in conformity with the policy of the State Government that it no longer encouraged applications for land from individuals or companies for the purpose of planting oil palm (CCB 2, p. 4);

(iii) defendant's letter dated 27 December 2002 at para. 5 whereby they wanted a joint venture with the plaintiff which the latter contended was to circumvent the prohibition against the cultivation of oil palm by the former (CCB 2, p. 5);

(iv) defendant's letter of reminder dated 15 February 2003 to the plaintiff seeking an early reply (CCB 2, p. 6);

(v) plaintiff's letter dated 1 August 2003 to the defendant that "Tanah akan disewakan terlebih dahulu untuk tempoh tiga tahun pada kadar RM500/hektar/tahun bagi menilai pelaksanaan dan kemajuan projek sebelum diberikan pertimbangan untuk pajakan". (CCB 2, p. 7)

[20] The plaintiff further submitted that it was clear that cl. 1.02 of the agreement prohibited the cultivation of oil palm and the defendant's claim that there was approval from the "Menteri Besar"' regarding their application of 5 February 2007 could not be sustained as (i) he was only one of the

members of the Board of Directors of the plaintiff; and (ii) there was evidence given by SD1, Dato' Syed Hassan Nazari bin Syed Mohammad under cross-examination that "Cuma jumpa MB sahaja discuss sahaja". Counsel for the plaintiff added in oral submission that even if the court was to regard that there was consent from the "Menteri Besar", it was inherently improbable in the absence of any letter to indicate a change of policy either from the "Menteri Besar" or by the defendant to the plaintiff.

[21] In our judgment, the arguments of the plaintiff in paras. 19 and 20 above cannot be sustained and collapse in light of the following matters. In respect of the first ground, it is observed that the learned High Court Judge disapproved of the plaintiff's conduct in relying on usage of land use as a ground of termination of the agreement. With regard to the usage of the land, the learned High Court Judge found the plaintiff was aware that the defendant was cultivating oil palm but yet did not raise any objection for a considerable period of time. His Lordship in his grounds of judgment at para. 16, p. 9, RRT 1, (rekod rayuan tambahan 1) held as follows:

> Bermula daripada tahun 2007, iaitu setelah mengemukakan permohonan kepada MB, defendan telah mengeluarkan belanja yang besar untuk mengusahakan tanah tersebut dengan tanaman kelapa sawit.

His Lordship further held at para. 20, p. 12, RRT 1 the following:

> Adalah tidak masuk akal jika dikatakan di dalam tempoh tersebut tidak ada pegawai/atau pun kakitangan plaintif yang pergi membuat lawat periksa tanah tersebut, melainlah pegawai atau kakitangan plaintif tidak menjalankan tugas mereka atau pun plaintif sememangnya tidak membuat sebarang inventori bagi menyimpan rekod tanah-tanah miliknya.

[22] The learned High Court Judge made a finding that by its conduct the plaintiff had encouraged the defendant to incur huge expenses in improving the Hulu Bernam land and developing it into an oil palm plantation. This point was dealt with by the learned High Court Judge at para. 21 of the grounds of judgment as follows:

> Adalah tidak adil untuk mendapati defendan melakukan pelanggaran syarat perjanjian berkait dengan jenis tanaman sedangkan plaintif sendiri melalui sikap berdiam diri untuk suatu tempoh yang lama seolah-olahnya merestui usaha defendan menanam kelapa sawit di atas tanah tersebut. Tambahan pula, defendan telah mengeluarkan belanja yang besar bagi mengusahakan tanah tersebut. Fakta tersebut tidak boleh dinafikan pihak plaintif.

[23] The absence of any objection by the plaintiff for approximately two years despite the availability of the site report in 2014 until the plaintiff was awakened from its stupor by the issuance of the notice of termination in 2016, in our judgment has estopped the plaintiff from arguing that cl. 3.02

of the agreement has not been triggered. Whilst it is true that the defendant was aware that oil palm cultivation was prohibited, it had made an application for the cultivation of the oil palm on the Hulu Bernam land from the "Menteri Besar". There was no letter from the plaintiff to the defendant that they were not satisfied with the performance of the defendant as to the usage of the land despite the plaintiff's site report in 2014. The plaintiff's allegation that the defendant had breached the agreement by cultivating oil palm which was prohibited was a non-starter and flies in the face of their own conduct that it had obtained title to the Hulu Bernam land in 2013 bearing the express condition "Tanaman Komersial – Kelapa Sawit". To our mind the plaintiff must have been satisfied with the progress of the project and the issue of defendant's cultivation of the oil palm no longer holds water given that the plaintiff has condoned and impliedly approved the same by not raising its objection at the earliest opportunity available (not even a letter to the defendant registering its protest after the receipt of the 2014 site report) until the 2016 notice of termination to the defendant.

[24] Having arrived at the findings at paras. 21 and 22 above, in our judgment, the learned High Court Judge erred in refusing specific performance because there was no subsisting agreement between the parties which should form the basis of any decree of specific performance. This is what His Lordship stated at para. 26 of the grounds of judgment:

> [26] Di atas imbangan kebarangkalian, adalah didapati bahawa defendan gagal membuktikan telah wujudnya perjanjian pajakan bagi tanah tersebut. Oleh kerana itu, tidak ada asas bagi defendan memohon suatu perintah pelaksanaan spesifik untuk satu perjanjian yang tidak wujud.

[25] We are of the view that although the agreement cannot be registered under the National Land Code, the court of equity treats the agreement as an equitable lease and may grant specific performance. We drew support for this proposition from the case of *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 1 LNS 161; [1971] 2 MLJ 105, where the respondents (to whom the original proprietor transferred the premises) brought an action for recovery of possession after issuing a notice terminating the tenancy when the appellant refused to pay the increase in rental demanded. Prior to this there was an agreement between the original proprietor (landlord) and the appellant whereby the former agreed to give permanent tenancy of the premises or (as stated in the uncertified translation) a tenancy "as long as the tenant wishes to occupy" and that the landlord should not increase the rent of the premises as he likes or eject the tenant. The trial judge gave judgment in the respondents favour on the ground that the tenancy being of indefinite duration was void under the provisions of s. 30 of the Contracts (Malay States) Ordinance 1950.

[26] The Federal Court in *Yong Tong Hong* (*supra*) allowed the appeal and, among others, held (at p. 105) the following:

> (1) as the appellant in this case had expended money on the land of another in the expectation of being allowed to remain in occupation, equity would protect his occupation of the land;
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> ...
>
> (3) the court would give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows which, under the provisions of section 221(3)(b) of the National Land Code is a maximum period of 30 years.

[27] Pursuant to s. 11(2) of the Specific Relief Act 1950 (Act 137), there is a statutory presumption that a breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. A case in point is *Loh Koon Moy & Anor v. Zaibun Sa Syed Ahmad* [1977] 1 LNS 65; [1978] 2 MLJ 29. The brief facts are that the first appellant had agreed to buy a piece of land from the respondent, the administratrix of an estate whereby there was an order of the court empowering the respondent to sell the land. The trial judge gave damages in favour of the appellant having found that there was an oral agreement enabling the respondent to pay damages for breach. The appellant appealed seeking for specific performance.

[28] The Federal Court in *Loh Koon Moy* (*supra*) allowed the appeal holding that the trial judge had no grounds to exercise his discretion to give damages *in lieu* of specific performance. The reason being at p. 30 G-H the Federal Court opined that there is "... a presumption in favour of specific performance of a contract to sell land which is statutorily provided in s. 11(2) of the Specific Relief Act 1950 ... The burden of rebutting the presumption lay on the respondent".

[29] In this appeal before us, we find the plaintiff did not adduce any evidence at whether there would be hardship or unusual difficulty in performing the bargain. On the contrary we agreed with the submission of the defendant that it has adduced sufficient evidence that:

(a) it had to abandon Bidor land after incurring considerable expenses in clearing the land due to no fault of its own

(b) it wasted resources and suffered loss as a result of planting fruit crop in Hulu Bernam land

(c) spent large amount of money in cultivating oil palm and thus improving and enhancing the value of the Hulu Bernam land

(d) the Appellant's development of the plantation is a long term investment and it would cause immense hardship if the Appellant is ordered out of the land

(e) it has performed its part of the bargain and settled all the rental for the first 3 years and is ready and willing to pay the balance of the premium for the lease.

[30] On the other hand, we find there is evidence before the trial court that the plaintiff did not act fairly to the defendant on account of the matters which we have alluded in paras. 15, 16, 17, 21, 22 and 23 above.

[31] The second ground relates to the non-payment of rental which found favour with the learned High Court Judge and the plaintiff succeeded on this ground.

[32] On the issue of the non-payment of rental, the learned High Court Judge held the following at para. 22, p. 12 of his grounds of judgment:

> [22] Keduanya, mengenai bayaran sewa tanah tersebut. Keterangan menunjukkan bahawa defendan hanya membuat bayaran sewaan hanya untuk tempoh 3 tahun pertama sahaja. Setelah itu, defendan gagal membuat sebarang bayaran sewa bagi tanah tersebut bermula daripada tahun 2006 sehinggalah tindakan saman ini diambil oleh plaintif. Kegagalan defendan membuat bayaran sewa tanah tersebut jelas melanggari syarat asas perjanjian penyewaan. Oleh itu, adalah didapati bahawa plaintif berhak untuk menamatkan perjanjian penyewaan tersebut dan menuntut milikan kosong tanah tersebut.

[33] Learned counsel for the plaintiff submitted (i) there was not even a lease as the plaintiff did not grant a lease but what the defendant had was an option to apply for the 60-year lease; (ii) clause 3.02 has not even been enforced and argued if there was no lease as the judge has found, the defendant is a tenant holding over of the category of a tenant at will and not a tenant of sufferance as the defendant was in occupation of the Hulu Bernam land for three years with the consent of the plaintiff. Counsel submitted that since the defendant was a tenant at will, it was sufficient for the plaintiff to issue a summons for vacant possession without a letter of demand. Paragraphs 171 and 172 of the *Halsbury's Law of England*, 4th edn, reissue and the case of *Nadchatiram Realties (1960) Ltd v. Raman & Ors* [1965] 1 LNS 122; [1965] 2 MLJ 263 (HC) at p. 266 H-I were cited.

[34] We have no issue with the proposition of law enunciated in the aforesaid authorities cited. However it is our view that having regard to the reasoning of the learned High Court Judge in para. 32 above, it is clear why the learned High Court Judge's ruling that the defendant had breached the agreement for non-payment of rental is faulty.

[35] The default clause in cl. 7.01 of the agreement provides:

> 7.01 Regardless of any conflicting provision in this agreement if Second Party:
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> a) Fail to pay any payment under the Second Schedule; or
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> b) Failure to pay any payment due under this agreement; or
>
> c) Violate any of the terms and stipulations of this agreement; or

d) Before paying full rental and lease, the Second Party becomes a bankrupt or enters into any composition or make an agreement with a voluntary or obligatory liquidated disbursement; or

e) If any execution is done on them or their property;

and in any such case it shall be lawful for the First Party at any time thereafter to terminate the agreement by giving two (2) weeks' notice to the Second Party by which this agreement shall become null and void and of no effect, First Party shall also have the discretion to forfeit all or part of the lease payment paid by the Second Party.

[36] In the notice of termination acting on the plaintiff's instructions, the plaintiff's solicitor, among others, stated the following:

(i) 6. Following the mutual understanding, you have paid to our clients, from first year to third-year land rent totalling RM171,180.00.
We have been directed also that you have violated the understanding as follows:

DETAILS OF BREACHES

a. Did not pay rental payments from the fourth year (2006) up to fifteenth year (2015);

b. Have used the second land by planting palm oil which our clients never agreed;

c. Did not get approval or permission of our clients for planting oil palm on the second land;

d. Erecting permanent buildings and/or structures on second land without our clients' permission;

e. Obtaining profits by engaging in illegal activities on the second land by planting oil palm.

(para 6);

(ii) 8. We have been instructed by our clients that you are still in occupation of the second land since 2006 and had failed to pay the remaining rental still outstanding amounting to RM513,540.00 and you have also failed to comply the fundamental terms of the understanding and or the said Agreement by cultivating oil palm on the second land without any permission from our clients. Therefore, you have been persistently violating the terms of the Agreement and thus committed trespass onto the second land.

(para 8 (should read as "para 7").

[37] On a construction of the agreement, we are of the considered view that there ought to be a prior demand made before the plaintiff could terminate the agreement. In fact, the Hj Nor Asri bin Abdullah (SP1) who was in the plaintiff's employment as the Pengurus Perancang Penilai at the material time during cross-examination admitted the rental for the three years had been fully settled (p. 89, rekod rayuan bahagian A) and conceded there was no prior demand for rental after the three-year period until the notice of termination was issued in 2016.

[38] We therefore find the notice of termination was bad in law because:

(i) there was no demand notice issued to the defendant giving them two weeks' notice prior to the termination as required in accordance with cl. 7.01 of the agreement; and

(ii) there were no rentals due and owing to the plaintiff as the time for the payment of the premium had not been triggered yet as the plaintiff did not serve the notices required under s. 5 of Schedule 1 stipulated therein as follows:

FIRST SCHEDULE

SECTION	ITEMS	PARTICULARS
1 ...		
2 ...		
3 ...		
4 ...		
5.	Mode of payment of the rental and premium for land lease	First Year Rental: RM70,820/- Second Year Rental: RM70,820/- Third Year Rental: RM70,820/- Premium for lease after three years is RM708,200/- which includes RM212,460/- paid earlier. Balance of payment for premium amounting to RM495,740/- is to be paid as follows: (i) 20% upon receipt of the letter of confirmation of lease from the First Party (ii) 20% within three (3) months from the receipt of the letter of confirmation of lease from the First Party

(iii) 30% within six (6) months of receipt of the letter of confirmation of lease from the First Party

(iv) 30% within one (1) month from the date of the notice of issue of grant for the land by the First party in favour of the Second Party.

[39] In our judgment the learned High Court Judge erred because His Lordship did not consider the First Schedule, s. 5 referred in para. 38(ii) above on the structure of the payment which operated as a prepayment of premium for the lease: premium for the lease after three years being RM708,200 which includes (termasuk) RM212,460 which has been paid earlier (it is undisputed that the amount is now RM171,180 because of the adjustment made due to reduced acreage) leaving a balance (baki bayaran) of RM495,740 to be paid.

[40] What happened in this case is that the lease had kicked in but the plaintiff defaulted in that having obtained the title, they failed to inform the defendant; if they had informed the defendant, the plaintiff would have been entitled to the first tranche of the balance of payment for premium of the lease ie, 20% from the defendant. In other words, equity has set in and the defendant is an equitable lessee and not a tenant at will as submitted by learned counsel for the plaintiff for the reasons which we have proffered in paras. 25 and 26 above.

Conclusion

[41] For all the foregoing reasons we find there are merits in the appeal which compelled us to exercise our appellate intervention.

[42] We unanimously made the following order:

(i) the defendant's appeal is allowed with costs of RM10,000 subject to allocatur;

(ii) the plaintiff's cross-appeal is dismissed;

(iii) the defendant's counterclaim for a declaration that the defendant is entitled to a lease for a period of 60 years is allowed subject to the terms of the agreement dated 30 August 2003;

(iv) both parties are granted liberty to apply to the High Court; and

(v) the decision of the High Court dated 6 August 2018 is set aside.